SAAD ABAS & ANOR

v.

PP

COURT OF APPEAL, KUALA LUMPUR
LAMIN MOHD YUNUS PCA
AHMAD FAIRUZ JCA
HAIDAR MOHD NOOR JCA
[CRIMINAL APPLICATION NO: K-07-8-97]
21 NOVEMBER 1998

CRIMINAL PROCEDURE: *Appeal - Leave to appeal to Court of Appeal - Section 50(2) Courts of Judicature Act 1964 - Real import of section - Prerequisites*

CRIMINAL PROCEDURE: *Appeal - Leave to appeal to Court of Appeal - Leave to appeal against order of High Court directing magistrate to call for accused's defence - Whether there was finality in decision of High Court - Whether decision involved a question of law - Whether has affected the event of the appeal - Whether application premature - Non-formulation of "question of law" in supporting affidavit - Whether fatal - Courts of Judicature Act 1964, ss. 3, 50(2), 50(3A)(i), 66 - Criminal Procedure Code, ss. 173, 180, 181*

WORDS & PHRASES: *"Decision" - "Order" - "Has affected the event of the appeal" - Courts of Judicature Act 1964, ss. 50(2), 50(3A)(i)*

The applicants were jointly tried before the magistrate for an offence under the Penal Code and were acquitted and discharged at the end of the prosecution case. Following an appeal by the Public Prosecutor, the High Court allowed the appeal and ordered that the applicants be called to enter their defence. Dissatisfied with the learned judge's decision, the applicants applied for leave to appeal to the Court of Appeal under s. 50(2) Courts of Judicature Act 1964 ('the Act'). Before the learned appellate judges, the applicants argued, *inter alia*, that leave ought to be granted as there was finality in the decision of the High Court. In filing their application for leave, however, the applicants had not formulated the "questions of law" within which they intended to confine their appeal, and that being so a question arose as to whether leave to appeal, in the circumstances, ought to be granted by the appellate court.

Held:

Per Lamin Mohd Yunus PCA

[1] The position under s. 50(2) of the Act is that, it requires the question of law to be determined by the High Court and sought to be referred to the Court of Appeal for its determination to be one which "has affected the event of the appeal" and has influenced the result of the appeal and in a sense there is finality in the decision.

[1a] The present s. 50(2) and the old s. 50(3A)(i) of the Act employ the words "decision" and "order" respectively. These terms do not merit any lengthy discussion apart from saying that "decision" means "judicial determination: decision of a court" and that "order" means "mandate, precept or command". Be that as it may, whether it is a judgment, decision or order pronounced by a court, there must be an element of finality before there can be an appeal.

[1b] Bearing in mind the aforesaid, and Amendment Act A 1031 of 1998, which amended the definition of "decision" in s. 3 of the Courts of Judicature Act 1964, it must be ascertained, for the purpose of s. 50(2), whether the "decision" of the High Court in ordering the applicants to enter on their defence was a ruling that had the effect of finally disposing of their rights.

[2] In criminal trials, magistrates are bound by the rules of procedure as laid down in the Criminal Procedure Code, particularly s. 173 thereof. Consequently, a complete criminal trial must involve both the case for the prosecution and the case for the defence.

[2a] When a judge is required by a written law to call upon an accused to enter on his defence upon the prosecution having proved its case, the accused is under an obligation to submit to the order of the judge by making his defence in any way in accordance with the law. In the instant case, when the High Court judge ruled at the end of the appeal by the prosecutor that the applicants must enter their defence, it was as good as saying that the magistrate himself had decided to call for the defence. The proceedings, hence, must continue until the end of the case for the defence and only then would the court be able to finally decide the fate of the applicants.

[2b] There was consequently no finality in the order of the High Court ordering the applicants to enter their defence. Only after the close of the defence as a result of that order would there be finality. And only after the close of the defence would there be a decision to "affect the

event of the appeal" ie, that the defence story would finally determine the result of the whole case which was the purpose of the appeal. It would thus be premature to question the propriety of the decision at this stage.

[3] One vital point to be shown in an application under s. 50(2) of the Act is that, the affidavit in support must formulate the "questions of law" which have arisen in the course of the appeal "and the determination of which by the High Court has affected the event of the appeal". Not one such "question of law" was formulated here. On this ground alone this application could be summarily dismissed.

[4] The court must enter a caveat for applications of this nature, as otherwise, the trial court would have to accede to numerous requests for postponements to enable each party to appeal against an order made in the course of the trial whereby the entire progress of the trial would be frustrated. In any case, there is no authority to support the proposition that an order of a court calling upon the accused to enter on his defence can be stayed so as to allow the accused to file an appeal against that order on the ground that the finding of the court was grossly wrong in law and in fact.

[Application dismissed; case not a fit and proper one for leave to be granted.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Pemohon-pemohon telah dibicarakan secara bersama di hadapan yang arif majistret kerana satu kesalahan di bawah Kanun Keseksaan, dan di akhir kes pendakwaan, telah dibebas dan dilepaskan. Berikut rayuan oleh Pendakwa Raya, Mahkamah Tinggi membenarkan rayuan dan membuat perintah supaya pemohon-pemohon dipanggil membela diri. Tidak berpuashati dengan keputusan yang arif Hakim, pemohon-pemohon memohon untuk kebenaran untuk merayu ke Mahkamah Rayuan di bawah s. 50(2) Akta Mahkamah Kehakiman 1964 ('Akta'). Di hadapan yang arif hakim-hakim rayuan, pemohon-pemohon berhujah, antara lain, bahawa kebenaran harus diberi oleh kerana terdapat kemuktamadan dalam keputusan Mahkamah Tinggi. Sewaktu memfailkan permohonan mereka, pemohon-pemohon bagaimanapun gagal merumuskan "persoalan undang-undang" di mana mereka berhasrat untuk menumpukan rayuan mereka, dan dengan itu berbangkit soalan samada kebenaran untuk merayu, dalam halkeadaan yang wujud, harus diberikan oleh mahkamah rayuan.

Diputuskan:
Oleh Lamin Mohd Yunus PMR

[1] Kedudukan di bawah s. 50(2) Akta adalah bahawa ianya memerlukan persoalan undang-undang yang diputuskan oleh Mahkamah Tinggi dan yang ingin dirujuk untuk keputusan Mahkamah Rayuan itu merupakan suatu persoalan yang "memberi kesan kepada halehwal rayuan" ("has affected the event of the appeal") dan yang mempengaruhi keputusan rayuan dan di mana terdapat kemuktamadan dalam keputusan yang dibuat.

[1a] Seksyen 50(2) Akta yang ada sekarang dan s. 50(3A)(i) lama Akta masing-masing menggunakan perkataan "keputusan" dan "perintah". Perkataan-perkataan ini tidak memerlukan perbincangan panjang lebar selain dari menyatakan bahawa "keputusan" bermakna "keputusan kehakiman: keputusan yang dibuat mahkamah" dan "perintah" bermakna "mandat, petunjuk, arahan". Walau apa pun, samada mahkamah mengumumkan suatu penghakiman, keputusan ataupun perintah, harus ada elemen kemuktamadan sebelum rayuan boleh dibenarkan.

[1b] Mengambilkira persoalan di atas, dan Akta Pindaan A 1031 1998, yang meminda definisi "keputusan" dalam s. 3 Akta Mahkamah Keadilan 1964, ianya mesti dipastikan, untuk maksud s. 50(2), samada "keputusan" Mahkamah Tinggi dalam memerintahkan pemohon-pemohon untuk mengemukakan pembelaan merupakan suatu 'ruling' yang mempunyai kesan memutuskan hak-hak mereka secara muktamad.

[2] Dalam suatu perbicaraan jenayah, majisteret adalah terikat kepada peraturan-peraturan prosedur yang tertera dalam Kanun Prosedur Jenayah, terutama sekali s. 173nya. Ianya mengikut bahawa, sesuatu perbicaraan jenayah yang sempurna mestilah mengandungi kedua-dua kes pendakwa dan pembela.

[2a] Apabila seseorang hakim dikehendakki oleh undang-undang bertulis supaya memanggil tertuduh membela diri di akhir kes pendakwa, tertuduh bertanggungjawab untuk mengemukakan pembelaannya walau dengan apa cara pun mengikut lunas undang-undang. Dalam kes ini, apabila hakim Mahkamah Tinggi memutuskan di akhir rayuan oleh pendakwa bahawa pemohon-pemohon mesti mengemukakan pembelaan, ianya samalah seperti majisteret sendiri memutuskan untuk memanggil pembelaan. Prosiding berkenaan, dengan itu, mestilah diteruskan hingga ke akhir kes pembelaan dan hanyalah selepas itu mahkamah berupaya untuk memutuskan secara muktamad nasib pemohon-pemohon.

[2b] Ianya mengikut bahawa tidak ada kemuktamadan dalam perintah Mahkamah Tinggi memrintahkan pemohon-pemohon untuk membela diri. Kemuktamadan hanya akan wujud pada penutup kes pembelaan akibat dari perintah tersebut. Dan hanya pada penutup kes pembelaan terdapat keputusan yang akan "affect the event of the appeal" ie. bahawa cerita pihak pembela akan memutuskan secara muktamad keseluruhan kes yang mana merupakan tujuan rayuan. Ianya dengan itu 'premature' untuk mempersoalkan keputusan di peringkat ini.

[3] Satu perkara penting yang perlu ditunjukkan dalam sesuatu permohonan di bawah s. 50(2) adalah bahawa, afidavit sokongannya mestilah merumus "persoalan undang-undang" yang berbangkit sewaktu perjalanan rayuan yang mana keputusannya oleh Mahkamah Tinggi "has affected the event of the appeal". Tidak satu pun persoalan undang-undang dirumuskan di sini. Atas alasan ini sahaja mahkamah sudah boleh menolak permohonan.

[4] Mahkamah mesti menghalang permohonan-permohonan seperti ini. Jika tidak, mahkamah perbicaraan akan terpaksa akur kepada banyak permohonan untuk penangguhan bagi membolehkan sesuatu pihak itu membuat rayuan terhadap keputusan yang dibuat sewaktu perbicaraan yang mana akan memudaratkan perjalanan perbicaraan. Walau apa pun, tidak ada autoriti untuk menyokong pandangan bahawa sesuatu perintah yang dibuat oleh mahkamah yang memanggil tertuduh untuk membela diri itu boleh ditangguhkan bagi memboleh tertuduh merayu terhada perintah tersebut atas alasan bahawa keputusan mahkamah itu jelas silap di sisi undang-undang dan fakta.

[Permohonan ditolak; kes bukan kes yang sesuai dan patut untuk kebenaran diberi.]

Cases referred to:
Au King Chor & Ors v. PP [1985] 1 CLJ 122 ***(foll)***
Gng Eng Hwoo v. Regina [1954] MLJ 256 ***(refd)***
Lee Pin Seng v. PP [1985] 2 MLJ 454 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 3, 50(2), (3A)(i), 66
Criminal Procedure Code, ss. 173(f), 180, 181
Criminal Procedure Code [India], s. 233(1)
Criminal Procedure Code [Sing], s. 296
Evidence Act 1950, s. 32
Penal Code, ss. 354, 420

Other sources referred to:
Code Of Criminal Procedure, Ratanlal & Dhirajlal, 1992, 14th edn, p 316
Malik's Criminal Trials, 2nd edn, p 689
Wharton's Law Lexicon, 14th edn, p 305

For the applicants - Karpal Singh (Jagdeep Singh Deo with him); M/s Karpal Singh & Co
For the Public Prosecutor - Zauyah Bee Loth Khan DPP

Reported by WA Sharif

JUDGMENT

Lamin Mohd Yunus PCA:

This is a joint application by the two applicants for leave to appeal to the Court of Appeal under s. 50(2) of the Courts of Judicature Act 1964 ('Act 91). On 11 January 1995 each of the applicants was preferred with a charge for an offence of using criminal force on a female adult under s. 354 of the Penal Code. They were jointly tried and the learned magistrate on 1 September 1996 acquitted and discharged both the applicants at the end of the case for the prosecution. The learned Deputy Public Prosecutor appealed. On 2 April 1997 the appeal was heard and the learned judge of the High Court, Alor Setar allowed the appeal with the order that both the applicants were to enter their defence before the learned magistrate. They were not satisfied with the decision of the learned judge and so they are now before us praying that they be granted leave to appeal to this court.

Section 50(2) of the Courts of Judicature Act 1964 reads:

> (2) An appeal shall lie to the Court of Appeal, with the leave of the Court of Appeal, against any decision of the High Court in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by a Magistrate's Court but such appeal shall be confined to only questions of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision.

Mr. Karpal submitted that the words "decision of the High Court" appearing in sub-s. (2) must mean that the decision is final and therefore appealable. Puan Zauyah Bee bt. Loth Khan, the learned Deputy Public Prosecutor contended otherwise in that when a judge of the High Court made the order for the defence to be called after hearing an appeal by the prosecution, that order must be complied with and the proceedings before the learned magistrate must therefore continue in order to hear the defence. A similar situation arose in the case of *Lee Pin Seng v. Public Prosecutor* [1986] 2 MLJ 416. Briefly the facts of the case were that the applicant (the accused in the Sessions Court below) and four others were charged in the Sessions Court at Kuala Lumpur with an offence under s. 420 of the Penal Code. At the close of the case for the prosecution, the applicant and two others were acquitted. The Public Prosecutor appealed and the High Court ordered the applicant and the two others to enter their defence on the said charge. The applicant thereupon

applied to the Federal Court for an order pursuant to s. 66 of the Courts of Judicature Act regarding the provision of s. 173(f) of the Criminal Procedure Code. The provision of s. 173(f) as it was then reads:

> If, upon taking all the evidence hereinbefore referred to, the Court finds that no case against the accused has been made out which if unrebutted would warrant his conviction the Court shall record an order of acquittal.

The Federal Court had this to say:

> We agree with the respondent that although our section 173(f) may not be word for word the same as the Singapore section 188 nevertheless the effect is the same. The application is premature. There is nothing to prevent the applicant from taking up the matter at a later stage. There is no necessity for us to make a ruling now. Section 66(1) of the Courts of Judicature Act provides:
>
> > When an appeal from a decision of a subordinate court in a criminal matter has been determined by the High Court, the Federal Court may on the application of any party and shall on the application of the Public Prosecutor grant leave for the determination by itself of any question of law of public interest which has arisen in the course of the appeal and the determination of which by the High Court has affected the event of the appeal.
>
> In *Cecil Rajah v. Public Prosecutor* where the facts are quite similar in that the applicant was acquitted by the Sessions Court at the end of the prosecution case and on appeal by the respondent the High Court allowed the appeal and ordered the defence to be called. Thereupon, the applicant applied for certain questions of law of public interest to be reserved for the determination of this Court. Concluding the judgment of the Court, Suffian L.P. observed:
>
> > We are of the opinion that in the circumstances of this case the most convenient procedure should be followed, namely that we should uphold the learned judge's order dismissing the application, so that the case should continue before the President of the Sessions Court. Only after he has determined the case, after fully considering counsel's submission on the evidence and the law, and, if there is an appeal, after the learned High Court judge has given us the benefit of his views on all the points raised, will it be convenient for us to consider such points of law of public importance that may be referred to us by him under section 66(1).
>
> We did not think we should interfere with the decision of the learned Judge. The trial should continue before the learned President. We would dismiss the application.

The Federal Court was not concerned with the precise meaning of pertinent words. It was trying to explain in simplistic terms the whole process in respect of a criminal trial in its own words by saying:

> The application is premature. There is nothing to prevent the applicant from taking up the matter at a later stage. There is no necessity for us to make a ruling now.

A complete criminal trial involves both the case for the prosecution and the case for the defence. This is implied from the very charge itself. A charge accuses a person of having committed an offence. That suggests that he has to put up his defence. The moment the prosecution has proved its case meaning that the court has decided that there is a case for the accused to answer and the accused must therefore forthwith enter his defence. So it would be premature to question whether the decision calling for the accused to enter his defence was right or wrong. The proceedings must continue until the end of the case for the defence and only then would the court be able to finally decide the fate of the accused. On the other hand if he is acquitted at the end of the case for the prosecution, that means that the court has decided the fate of the accused and that as far as that court is concerned the accused is a free man. Similarly when a High Court judge rules at the end of an appeal by the prosecutor in a case where the accused has been acquitted at the end of the prosecution case that the accused must enter his defence, it is as good as saying that the Sessions Court Judge himself has decided to call for the defence assuming that he has analysed the case in the way that the High Court Judge has done. Only after he has heard the defence and only then can he finally decide the fate of the accused.

For the purpose of conducting criminal trials, magistrates are bound by the rules of procedure as laid down in the Criminal Procedure Code in particular s. 173. We quote the present para. (h)(i) of s. 173 below as it is directly in point in our present discussion. It reads:

> (h)(i) If the Court finds that a *prima facie* case has been made out against the accused on the offence charged, the Court **shall call upon the accused to enter on his defence.**

If at the end of the prosecution case the court finds that there is a *prima facie* case against the accused, the court has no other option but to call upon the accused to enter on his defence because of the word "shall". When a judge is required by a written law to call upon the accused to enter on his defence upon the prosecution having proved its case, the accused in our view will then be under an obligation to submit to the order of the judge by making his defence in any way in accordance with the provisions of the law. This supports our earlier proposition that a criminal trial involves both the prosecution case and the defence as being one single process. There is no room for the accused to avoid the issue of presenting his case. He must comply. The present para. (h)(i) was brought in by the 1997 amendment. Prior to 1997 the position was no different except that the mandatory provision to call for the defence was contained in the then para. (j) which reads:

(j) If the accused does not plead guilty to the charge as amended or if no amendment is made the accused **shall then be called upon to enter upon his defence and to produce** his evidence, and shall at any time while he is making his defence be allowed to recall and cross-examine any witness present in the Court or its precincts.

The present provision is found in para. (j)(2) of the same section and it reads:

(j)(2) If the accused does not plead guilty to the charge as amended, the accused shall be called upon to enter on his defence.

Somewhat similar provisions appear in the Criminal Procedure Code for the Court of Session in India as found in s. 233. Section 233(1) reads:

(1) Where the accused is not acquitted under section 232, **he shall be called upon to enter on his defence** and adduce any evidence he may have in support thereof.

The duty of the Court of Session in India to order the accused to enter on his defence as spelt out in s. 233(1) is in *pari materia* with our para. (j) of pre 1997 and para. (j)(2) of post 1997.

Ratanlal & Dhirajlal on the Code of Criminal Procedure (14th Ed. 1992) at p. 316 have taken the opportunity to comment thus:

COMMENT. – If the accused is not acquitted under the previous section then the judge calls upon him to enter on his defence. This is not a mere formality but is an essential part of criminal trial. The omission on the part of the Judge to do so occasions a failure of justice and is not curable under s. 464. The provision in subsection (1) is mandatory.

Malik's Criminal Trials (2nd Ed.) p. 689 also has this to say:

The provision in sub-section (1) of Sec. 233. Cr. PC, is undoubtedly a very salutary provision which is mandatory in nature and intended to protect the interests of the accused person. Under this provision, an accused person is entitled to be reminded of his right to adduce evidence in support of his plea. This is an important rule relating to the trial of a Sessions case and it is an essential part of criminal trial. The procedure prescribed in this sub-section is not an idle formality. Whether the accused would give an answer or not, it is the duty of the Sessions Judge to have put this question to him. Omission to put this question occasions failure of justice. In the absence of full and effective compliance of the mandatory provisions in Sec. 233(1), it cannot be said that the appellant has not been prejudiced in the conduct of his defence. In the circumstance it is only just and proper that the appellant should be given an opportunity to adduce defence evidence if any, in support of his plea.

> Defence – A prisoner on his trial is merely on the defensive and owes no duty to any one but himself, and he cannot be convicted because he had not explained to the Court how the offence was committed. The burden lies on the prosecution to prove beyond all reasonable doubt that offence was committed by the accused. Unless there has been *prima facie* sufficient legal evidence to convict an accused of an offence, he would not be bound to account for his movement at or about the time of a commission of the offence.

If we may repeat from the above quotation thus: "Unless there has been *prima facie* sufficient legal evidence to convict an accused of an offence, he would not be bound to account for his movements at or about the time of a commission of the offence." Conversely what that means is that when, at the end of the case for the prosecution upon finding by the court that a *prima facie* case has been made out, the accused will **be bound** to state his defence. The judge will then expect to hear his evidence so that he can finally decide on his fate.

With regard to criminal trials in the High Court, the position is the same because they are governed by ss. 180 and 181. This is so both in pre-1997 and the present situation. Only the wording has been amended but the effect is the same. We have uncovered no other authority from a higher tribunal either here or elsewhere to support the proposition that an order of a court calling upon the accused to enter on his defence can be stayed so as to allow the accused to file an appeal against that order on the ground that the finding of the court was grossly wrong in law and in fact. Neither has Mr. Karpal been able to assist us. We think it would be preposterous to allow the accused to have his way. As we have said earlier that it is the very nature of an accusation to initiate a criminal trial with a formulation of a charge and logically it demands a continuous process for both the prosecution and the defence. That was translated into a procedure as enacted in ss. 173, 180 and 181 of the Criminal Procedure Code.

The next issue under s. 50(2) is whether the "order" or "decision" to call for the defence is "a question of law which has arisen in the course of the appeal and the determination of which by the High Court has affected the event of the appeal." In the case of *Au King Chor & Ors. v. Public Prosecutor* [1985] 1 MLJ 216, the Federal Court had to decide on two applications for leave to appeal to the Federal Court under the old provision of sub-s. (3A)(i) of s. 50 of the Courts of Judicature Act. For ease of reference I repeat the full text of sub-s. (3A) which was introduced by Act A556 of 1983 and it took effect on 13 May 1983. (Note: The said subsection was however deleted by Act A606 of 1984 which took effect on 1 January 1985.) Subsection (3A) reads:

(3A) (i) Notwithstanding the preceding provisions of this section, either party may apply to the Federal Court for leave to appeal against any other order made by the High Court involving a question of law of public interest that would affect or has affected the course of the trial in the exercise of its original criminal jurisdiction.

(ii) The application for leave referred to in paragraph (i) shall be made to the Federal Court by motion within seven days of the making of the order sought to be appealed against, and in the event leave is granted, the appeal shall proceed to be heard on the motion for leave.

The two applications put before the court the following two questions namely (a) whether the admission of a documentary evidence under s. 32 of the Evidence Act 1950 was right without holding a proper inquiry or trial within-a-trial and (b) whether the admission of a documentary evidence made either wholly or in part by the accused was right without its makers being called to tender and produce them. There were nine accused who were jointly tried by the High Court below and in the course of the trial two prosecution exhibits namely the two documents were admitted by the learned trial Judge. It was the submission of the counsels for the defence that the orders of the learned trial judge admitting those documents involved a question of law of public interest affecting the course of the trial and therefore it was a proper case for leave to appeal to be granted. The applications were however dismissed. The so called questions of law in *Au King Chor's* case do appear to be different from the one in the case before us. In the former, the question related to the orders of the judge admitting documentary evidence in the course of a trial whereas in the latter ie, in the case before us related to the order calling for the defence. Both have one quality in common in that they are incidences occurring in mid-trial. In this regard I propose to repeat the last few passages from the judgment in *Au King Chor's* case as follows:

An application for leave to appeal against an order made by the High Court involving a question of law under section 50(3A)(i) is, in that sense, similar to an application for leave for the determination of a question of law under section 66 of the Act. However there seems to be a distinguishing feature. The clear words of section 50(3A)(i) indicate that fundamentally the order the party seeks to appeal against should not only involve a question of law of public interest but must also be one which would affect or has affected the course of the trial. It entails, in our view, some element of finality in the order such that it would affect or has affected the course of the trial meaning the passage or progress of the proceedings.

Subsection (3A)(i) requires that the question of law of public interest to be determined by the Court must be that "would affect or has affected the course of the trial ..." In the view of the Federal Court that would mean:

> It entails, in our view, some element of finality in the order such that it would affect or affected the course of the trial meaning the passage or progress of the proceedings.

The court proceeded to observe as to the intent or purport of the words: "has affected the course of the trial" appearing in sub-s. (3A)(i) and the words "has affected the event of the appeal" appearing in the old s. 66 and it had this to say:

> The position under section 66 of the Act is that it requires the question of law determined by the High Court and sought to be referred to the Federal Court for its determination to be one which has affected the event of the appeal and has influenced the result of the appeal and in the sense that there is a finality in the decision. Section 50(3A)(i), on the other hand, although it does not contain similar words such as "has affected the event of the appeal," but contains the words "would or has affected the course of the trial," we are nonetheless of the view that they do produce a substantially similar effect.

Those words have the effect of determining the real import of the provision and therefore it does not matter whether the word "order" or "decision" is being used.

The present s. 50(2) also carries the words "has affected the event of the appeal" and we therefore do not propose to depart from what has just been said above. The order of the High Court in the present case for which leave to appeal is sought was that the applicants were to enter their defence. At the stage of making the order certainly it has no finality in its intent. Only after the close of the defence as a result of that order will there be finality. Only after the close of the defence will there be a decision to "affect the event of the appeal" meaning that the defence story will finally determine the result of the whole case which was the purpose of the appeal.

The other point is that the present s. 50(2) employs the word "decision" while s. 50(3A)(i) employs the word "order". We do not think that they merit any lengthy discussion in view of the context in which they are being used. However to refresh our memory, we take the liberty to refer to Wharton's Law Lexicon (14th Ed.) at p. 305 for the meaning of the word "decision" and it gives us the meaning simply as "a judgment". For the word "judgment" at p. 545 it means 'judicial determination: decision of a court." It also gives some background history as to the usage of the word and also mentions species of judgments such as "interlocutory" and "final". For our present purpose we are satisfied and it is sufficient with its meaning as "judicial determination: decision of a court." As for the word "order" at p. 718, it gives the meaning as "mandate, precept, command:" while for the word "precept" it gives at p. 789 as "rule authoritatively given; a mandate;" Whitton J in the case of *Gng*

Eng Hwoo v. Regina [1954] MLJ 256 attempted to look for the definition of the word "order" appearing in s. 296 of the Singapore Criminal Procedure Code (Cap. 21). Section 296 reads:

> 296. (1) No appeal shall lie from a judgment, sentence or order of a criminal Court except as provided for by this Code or by any other law for the time being in force.
>
> (2) No appeal shall lie from a judgment, sentence or order of a Police Court in any of the cases specified in Schedule 'C'.

The learned judge had this to say at p. 257:

> I have been unable to find any definition of the word "order" which appears to fit its use in this section, but my research into the matter has led me to the conclusion that in connection with a criminal cause or matter the word is confined, broadly speaking, to those final decisions of a Court which affect parties to the proceedings in respect of their person or property.

Whether it is a judgment, decision or order pronounced by a court, there must be an element of finality before there can be an appeal.

Now we may recall s. 50(2) of the Courts of Judicature Act 1964, it employs the word "decision" which is defined in s. 3. Early this year by Amendment Act A 1031 of 1998, that definition was amended to read:

> "decision" means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

So, for the purpose of s. 50(2), this court has first to ascertain whether the "decision" of the High Court in ordering the applicants before us to enter on their defence was a ruling that had the effect of finally disposing of their rights. Certainly not and it would only happen after a decision had been made at the close of the defence.

Now, one final and vital point to be shown in an application made under s. 50(2) is one without which the application may be dismissed. It is this. The affidavit in support must formulate the "questions of law" which have arisen in the course of the appeal "and the determination of which by the High Court has affected the event of the appeal." Not one such "question of law" was formulated. If we had so minded we could have summarily dismissed the application on this ground.

In conclusion we seriously think that we should enter a caveat in an application of this nature and the reason for this we find in the words of the Federal Court in *Au King Chor's* case (at p. 219) appropriate:

Assuming for a moment that his is not what is intended by the legislature we can only foresee an intolerable position emerging and the trial Court shall have to accede to numerous requests for postponements to enable each party to appeal against an order made in the course of the trial whereby the entire progress of the trial would be frustrated.

For the above reasons, we are of the view that this is not a fit and proper case for leave to appeal to be granted. The application is therefore dismissed.